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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

PATRICK GENE POLAND,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

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ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

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RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

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EDITOR'S NOTE

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QUESTIONS PRESENTED FOR REVIEW

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1. Where an appellate court, after reversing petitioner's convictions, found that the evidence did not support the one aggravating circumstance found by the trial court, does the double jeopardy clause prohibit reimposition of the death penalty following petitioner's conviction upon a retrial?

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TABLE OF CONTENTS

Page

i

1 QUESTIONS PRESENTED FOR REVIEW

iii

2 TABLE OF CASES AND AUTHORITIES

1

3 STATEMENT OF THE CASE

6

4 ARGUMENTS

7

5

6 PETITIONER HAS NEVER BEEN ACQUITTED OF THE DEATH
7 PENALTY. THEREFORE, THE DOUBLE JEOPARDY CLAUSE
8 DOES NOT BAR HIS PRESENT DEATH SENTENCE.

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11 THE CONSTITUTION DOES NOT REQUIRE THAT THIS CASE
12 BE REMANDED FOR RESENTENCING.

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<u>TABLE OF CASES AND AUTHORITIES</u>	
<u>Case</u>	<u>Page</u>
Arizona v. Rumsey U.S. 104 S.Ct. 2305 81 L.Ed.2d 164 (1984)	8, 9
Barclay v. Florida U.S. 103 S.Ct. 3418 77 L.Ed.2d 1134 (1983)	11, 12
Bullington v. Missouri 451 U.S. 430 101 S.Ct. 1852 68 L.Ed.2d 270 (1981)	8, 9
Burks v. United States 437 U.S. 1 98 S.Ct. 2141 57 L.Ed.2d 1 (1981)	9
Green v. Zant 738 F.2d 1529 (11th Cir. 1984)	10
Hopkins v. State 664 P.2d 43 (Wyo. 1983)	10
Illinois v. Vitale 447 U.S. 410 100 S.Ct. 2260 65 L.Ed.2d 228 (1980)	7
Justices of Boston Municipal Court v. Lydon U.S. 104 S.Ct. 1805 80 L.Ed.2d 311 (1984)	9
Knapp v. Cardwell 667 F.2d 1253 (9th Cir. 1982)	10
Spaziano v. Florida U.S. 104 S.Ct. 3154 82 L.Ed.2d 340 (1984)	10
Spaziano v. State 443 So.2d 508 (Fla. 1983)	10
State v. Gillies 135 Ariz. 500 662 P.2d 1007 (1983)	12
State v. Gretzler 135 Ariz. 4: 659 P.2d 1 (1983)	10

State v. Nash 143 Ariz. 392 694 P.2d 222 (1985)	11
State v. Poland Ariz. 698 P.2d 183 (1985)	7, 10, 11
State v. Poland 132 Ariz. 269 645 P.2d 784 (1982)	2, 8
State v. Richmond 114 Ariz. 186 560 P.2d 41 (1976)	8, 11
United States v. Ball 163 U.S. 662 16 S.Ct. 1192 41 L.Ed. 300 (1896)	8
Zant v. Redd 249 Ga. 211 290 S.E.2d 36 (1982)	10
Zant v. Stephens U.S. 103 S.Ct. 2733 77 L.Ed.2d 235 (1983)	11, 12
<u>AUTHORITIES</u>	
Ariz.Rev.Stat.Ann. § 13-451	1
§ 13-452	1
§ 13-453	1
§ 13-454	1
§ 13-454(E)(5)	1
§ 13-454(E)(6)	1, 3
28 U.S.C. § 1257(3)	7
United States Constitution Eighth Amendment	11

STATEMENT OF THE CASE

On April 26, 1979, the grand jury of Yavapai County returned an indictment charging petitioner and his brother, Michael Kent Poland, with two counts of first-degree murder in violation of former Ariz.Rev.Stat.Ann. §§ 13-451 and -452. The indictment alleged that petitioner and his brother had killed two Purolator Security Guards, Russell Dempsey and Cecil Newkirk, on or about May 25, 1977.

9 The matter proceeded to trial before a jury in late
10 October of 1979. On November 24, 1979, the jury found both
11 men guilty of both of the murder charges. Then, pursuant to
12 former Ariz.Rev.Stat.Ann. §§ 13-453 and -454, the trial
13 court held an aggravation-mitigation hearing before imposing
14 sentence. On April 29, 1980, the trial court sentenced
15 petitioner and his brother to death for the murders of
16 Dempsey and Newkirk. In its special sentencing verdict the
17 trial court made the following findings with respect to
18 aggravating circumstances:

19 3. The court finds the aggravating
20 circumstances in § 13-454 E(3) [sic]¹ is
21 not present. This presumes the
22 legislative intent was to cover a contract
 killing. If this presumption is
 inaccurate, the evidence shows the
 defendants received something of pecuniary
 value, cash in the amount of \$281,000.00.

23 This, then, would be an aggravating
24 circumstance.

25 4. The court finds the aggravating
26 circumstance in § 13-454 E(4) [sic]² is
 present.

27 The cause of death was by drowning.
The victims were kidnapped on I-17 in

1. The correct statutory provision was former Ariz.Rev.Stat.Ann. § 13-454(E)(5).

2. The correct statutory provision was former Ariz.Rev.Stat.Ann. § 13-454(E)(6).

southern Yavapai County, they were transported to Lake Mead. At some time they were placed in canvas bags, taken onto the lake and placed in the water to drown. Such killings were especially hienous [sic], cruel, and depraved.

In applying this provision, the Arizona Supreme Court has said that these words have meanings that are clear. The evidence shows that the killings were carefully planned and cold blooded. This, by itself, is not sufficient, however, as pointed out in *St. v. Madsen* Ariz. _____, P2d _____ (filed March 26, 1980) and had the murders taken place at the scene on I-17 they would not likely have been set aside from the norm of first degree murder.

But the facts show the murders were shockingly evil, insensate, and marked by debasement.

The Defendants argue that the State has not shown the victims suffered pain, or that they were not drugged.

The guidelines of State v. Knapp 114 Az. 531, 562 P2d 704 closely reach this case. In Knapp the victims were incinerated. The autopsy shows there was carbon monoxide poisoning as well, a painless death. The nature of the killing itself is sufficient to set it aside from the norm. Placing victims in canvas bags and dropping them to a slow and terrifying death is grossly bad, sadistic and perverse.

The trial court found some mitigating circumstances (previous reputation for good character, close family ties), but concluded that they were not sufficiently substantial to call for leniency.

Petitioner and his brother appealed from the judgments of guilt and sentences imposed. On April 13, 1982, the Arizona Supreme Court reversed the convictions of petitioner and his brother and remanded the matter for a new trial. State v. Poland, 132 Ariz. 269, 645 P.2d 784 (1982). The reversal was based on the court's finding that the jury had been guilty of misconduct because it had considered evidence not admitted at trial. Id. at 281-85,

1 796-800. In their appellate brief petitioner and his
2 brother had argued that there was insufficient evidence to
3 support the trial court's finding of the aggravating
4 circumstance set forth in former Ariz.Rev.Stat.Ann.

5 § 13-454(E)(6). The Arizona Supreme Court responded to
6 that claim as follows:

7 In sentencing defendants, the trial
8 judge found the following aggravating
9 circumstance to exist:

10 *13-454(E)(6). The defendant committed
11 the offense in an especially heinous,
12 cruel, or depraved manner."

13 Finding no mitigating circumstances
14 sufficiently substantial to call for
15 leniency, the trial court imposed the death
16 penalty pursuant to A.R.S. § 13-454(D).

17 In interpreting the aggravating
18 circumstance that the offense was committed
19 in an especially heinous, cruel, or
20 depraved manner, we have stated:

21 * * * * the cruelty referred to in the
22 statute involved the pain and the
23 mental and physical distress visited
24 upon the victims. Heinous and depraved
25 as used in the same statute meant the
26 mental state and attitude of the
27 perpetrator as reflected in his words
28 and actions." State v. Clark, 126
29 Ariz. 428, 436, 616 P.2d 888, 896
30 (1980), cert. denied 449 U.S. 1067, 101
31 S.Ct. 796, 66 L.Ed.2d 612.

32 We do not believe that the evidence so
33 far produced in this case shows that the
34 murders were cruel. We have interpreted
35 "cruel" as "disposed to inflict pain esp.
36 in a wanton, insensate or vindictive
37 manner: sadistic." State v. Lujan, 124
38 Ariz. 365, 372, 604 P.2d 629, 636 (1979),
39 quoting Webster's Third New International
40 Dictionary. There was no evidence of
41 suffering by the guards. The autopsy
42 revealed no evidence that they had been
43 bound or injured prior to being placed in
44 the water, and there was no sign of a
45 struggle. Cruelty has not been shown
46 beyond a reasonable doubt. State v. Lujan,
47 supra; State v. Ortiz, Ariz., 639 P.2d 1020
48 (1981); State v. Bishop, 127 Ariz. 531, 622
49 P.2d 478 (1980); State v. Knapp, 114 Ariz.
50 531, 562 P.2d 704 (1977), cert. denied 435
51 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500
52 (1978).

1 Neither does the evidence support a
2 fining that the murders were heinous or
3 depraved. These terms were defined in
4 State v. Lujan, supra:

5 *heinous: hatefully or shockingly
6 evil: grossly bad
7 * * * * *

8 *depraved: marked by debasement,
9 corruption, perversion or
10 deterioration." 124 Ariz. at 372, 604
11 P.2d at 636.

12 The issue focuses on the state of mind of
13 the killer. State v. Lujan, supra. The
14 difficulty in making this determination in
15 the case at bar is that there is very
16 little evidence in the record of the exact
17 circumstances of the guards' deaths.
18 Although defendants' state of mind may be
19 inferred from their behavior at or near the
20 time of the offense, State v. Lujan, supra,
21 we know nothing of the circumstances under
22 which the guards were held hostage.

23 The State must prove the existence of
24 aggravating circumstances beyond a
25 reasonable doubt. State v. Jordan, 126
26 Ariz. 283, 614 P.2d 825, cert. denied 449
27 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251
28 (1980). We do not believe it has been
29 shown beyond a reasonable doubt that the
30 murders were committed in an "especially
31 heinous, cruel or depraved manner."

32 We do note, however, that the trial
33 court mistook the law when it did not find
34 that the defendants "committed the offense
35 as consideration for the receipt, or in
36 expectation of the receipt, of anything of
37 pecuniary value." A.R.S. § 13-454(E)(5).
38 In so holding, the trial judge stated:

39 *5. The court finds the aggravating
40 circumstance in § 13-454E(5) is not
41 present. This presumes the legislative
42 intent was to cover a contract
43 killing. If this presumption is
44 inaccurate, the evidence shows the
45 defendants received something of
46 pecuniary value, cash in the amount of
47 \$281,000.00.

48 *This, then, would be an aggravating
49 circumstance."

50 It was not until after the trial in this
51 case that we held, in State v. Clark,
52 supra, that A.R.S. § 13-454(E)(5) was not
53 limited to "murder for hire" situations,

1 but may be found where any expectation of
2 financial gain was a cause of the murder.
3 Upon retrial, if the defendants are again
4 convicted of first degree murder, the court
5 may find the existence of this aggravating
6 circumstance.

7 Reversed and remanded for new trial
8 pursuant to this opinion.

9 Id. at 285-86, 800-01.

10 A retrial of petitioner and his brother commenced in
11 October of 1982. On November 18, 1982, the jury found both
12 men guilty of both murder charges. Once again the trial court
13 held the statutorily required aggravation-mitigation hearing.
14 On February 3, 1983, the trial court sentenced petitioner and
15 his brother to death for the murders. The trial court made
16 the following findings on aggravating circumstances:

17 2. The court finds the aggravating
18 circumstance in §13-454 E(2) is not
19 present as to Michael Poland, but is
20 present as to Patrick Poland in that on
21 October 5, 1981, Patrick Poland was
22 convicted of bank robbery and use of a
23 dangerous weapon in a bank robbery in
24 violation of Title 18, U.S.C. §2113(a)
25 and (d), in U.S. District Court, affirmed
by the 9th Circuit Court of Appeals on
August 16, 1982. Certiorari denied by
the U.S. Supreme Court on November 23,
1982.

26 3. The court finds the aggravating
27 circumstance in §13-454 E(3) [sic] is
28 present. The evidence shows the
29 defendants received something of
30 pecuniary value, cash in the amount of
\$281,000.00. The murders were not
committed incidentally or accidentally to
the robbery, on the contrary they were
intentionally and premeditately [sic]
committed solely for a financial motive.

31 4. The court finds the aggravating
32 circumstance in §13-454 E(4) [sic] is
present. In making this finding, the
court is not unmindful of State v.
Poland Ariz. 645 P2d, 784, and
reviewed that case in light of the
evidence in this trial and other Supreme
Court guidelines.

1 The cause of death was by drowning.
2 The victims were kidnapped on I-17 in
3 southern Yavapai County, they were
4 transported to Lake Mead. Some 24 hours
5 later they were placed in canvas bags,
6 taken onto the lake and dropped in the
7 water to drown. The culmination of
8 months of planning. The executed plan
9 shows the state of mind of the defendants
10 and that such killings were especially
11 heinous [sic] and depraved.

12 In applying this provision, the
13 Arizona Supreme Court has said that these
14 words have meanings that are clear. The
15 evidence shows that the killings were
16 carefully planned and cold blooded.
17 This, by itself, is not sufficient,
18 however, as pointed out in St. v. Madsen
19 125 Ariz. 346, 609 P2d, 1046.

20 But the facts show the murders were
21 shockingly evil, insensate, and marked by
22 debasement.

23 The defendants argue that the State
24 has not shown the victims suffered pain,
25 or that they were not drugged. The
26 killings were cruel whether the victims
27 were drugged or not.

28 The guidelines of State v. Knapp 114
29 Az. 531, 562 P2d 704 and State v.
30 Gretzler, No. 3750-2 (Jan. 6, 1983)
31 closely reach this case. In Knapp the
32 victims were incinerated. The autopsy
33 showed there was carbon monoxide
34 poisoning as well, a painless death. In
35 Gretzler there was mental distress
36 visited upon the victims. In the case
37 sub judice, the nature of the killing
38 itself is sufficient to set it aside from
39 the norm. Holding the victims captives,
40 placing them in specially made canvas
41 bags and dropping them to a slow, painful
42 and terrifying death is grossly bad,
43 sadistic and perverse.

44 The trial court again found some mitigating circumstances,
45 but it concluded that they were not sufficiently
46 substantial to merit leniency.

47 Petitioner and his brother again appealed from the
48 judgments of guilt and sentences imposed. On March 20,
49 1985, the Arizona Supreme Court affirmed the judgments and
50 sentences. A three member majority rejected petitioner's

1 claim that the court had "acquitted" him of the death
2 penalty in his first appeal and that the double jeopardy
3 clause therefore precluded reimposition of the death
4 penalty. State v. Poland, Ariz., 698 P.2d 183,
5 198-99 (1985). The court also set aside the trial court's
6 finding that the killing had been committed in an
7 especially heinous, cruel or depraved manner. Id. at
8 199-200. In a motion for reconsideration, petitioner
9 argued that the court should have remanded for resentencing
10 after it set aside the "heinous, cruel or depraved"
11 aggravating circumstance. However, the Arizona Supreme
12 Court denied the motion for reconsideration. This petition
13 for writ of certiorari followed.

14 JURISDICTION

15 This Court has jurisdiction pursuant to 28 U.S.C.
16 § 1257(3).

17 ARGUMENTS

18 I

19 PETITIONER HAS NEVER BEEN ACQUITTED
20 OF THE DEATH PENALTY. THEREFORE,
21 THE DOUBLE JEOPARDY CLAUSE DOES NOT
22 BAR HIS PRESENT DEATH SENTENCE.

23 Petitioner contends that the Arizona Supreme Court
24 "acquitted" him of the death penalty on his first appeal,
25 and concludes that the double jeopardy clause bars any
subsequent reimposition of the death penalty. Petitioner's
position is meritless.

26 The double jeopardy clause protects against a second
27 prosecution for the same offense after acquittal, against a
28 second prosecution for the same offense after conviction,
29 and against multiple punishments for the same offense.

30 Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65
31 L.Ed.2d 228 (1980). It does not bar reprosecution of a
32

1 defendant whose conviction is overturned on appeal. United
2 States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300
3 (1896). The clause also protects a defendant in a capital
4 case who has been acquitted of the death penalty following
5 a capital sentencing proceeding that is like a trial.
6 Arizona v. Rumsey, U.S., 104 S.Ct. 2305, 81 L.Ed.2d
7 164 (1984); Bullington v. Missouri, 451 U.S. 430, 101 S.Ct.
8 1852, 68 L.Ed.2d 270 (1981).

9 Petitioner misrepresents the holding of the Arizona
10 Supreme Court in his first appeal. That court never
11 acquitted petitioner of the death penalty. It did find
12 that the evidence did not support the "heinous, cruel or
13 depraved" aggravating circumstance, but it did not find
14 that the evidence did not support the imposition of the
15 death penalty. It specifically left that question open
16 because of the trial court's conditional finding regarding
17 the "pecuniary gain" aggravating circumstance. State v.
18 Poland, supra, 132 Ariz. at 285-86, 645 P.2d at 800-01.
19 The Arizona Supreme Court, in all death cases,
20 independently reviews the record to determine for itself
21 the aggravating and mitigating factors, and then to
22 determine if the latter outweigh the former. State v.
23 Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51, cert.
24 denied, 433 U.S. 915 (1976). Thus, the fact that the state
25 did not appeal from the trial court's finding regarding the
26 "pecuniary gain" circumstance did not preclude the Arizona
27 Supreme Court from reviewing that finding. The court could
28 have gone on to determine for itself whether the death
29 penalty should have been imposed based upon the "pecuniary
30 gain" circumstance. However, since it had already reversed
31 petitioner's conviction, it simply left the question for
32

1 the trial court in the event of a conviction following the
2 retrial. Thus, the Arizona Supreme Court did not acquit
3 petitioner of the death sentence. Burks v. United States,
4 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1981), is
5 therefore inapplicable in this case. Since petitioner has
6 never been acquitted of the death sentence, the double
7 jeopardy clause offers him no protection from his present
8 sentence.

9 Petitioner would extend the holdings of Rumsey and
10 Bullington so that not only would Arizona's capital
11 sentencing proceeding be comparable to a trial for purposes
12 of the double jeopardy clause, but also that sentencing
13 "trial" would consist of a number of separate "trials" on
14 the existence or nonexistence of individual aggravating
15 circumstances. Thus, an "acquittal" of an aggravating
16 circumstance at one of these "sub-trials" would give the
17 defendant the protection of the double jeopardy clause and
18 preclude a "retrial" on that aggravating factor at any
19 subsequent resentencing. This Court has never extended the
20 protection of the double jeopardy clause this far. Double
21 jeopardy protection only comes into play where there has
22 been an end to a criminal proceeding, e.g., a jury verdict
23 of not guilty, a trial court's decision to impose a life
24 sentence rather than the death penalty in certain
25 trial-like capital sentencing proceedings, etc. See
26 Justices of Boston Municipal Court v. Lydon, ____ U.S.____,
27 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984). Double jeopardy
28 protection does not extend to the numerous individual steps
29 that lead up to a final decision in a criminal proceeding.

30 Thus, for purposes of double jeopardy protection, there
31 is no such thing as an "acquittal" of an aggravating
32 circumstance in a capital sentencing proceeding. See,

1 e.g., Green v. Zant, 738 F.2d 1529 (11th Cir.), cert.
2 denied, ____ U.S.____, 105 S.Ct. 607, 83 L.Ed.2d 716 (1984);
3 Knapp v. Cardwell, 667 F.2d 1253 (9th Cir.), cert. denied,
4 459 U.S. 1055 (1982); Hopkins v. State, 664 P.2d 43 (Wyo.),
5 cert. denied, ____ U.S.____, 104 S.Ct. 262, 78 L.Ed.2d 246
6 (1983); State v. Gretzler, 135 Ariz. 42, 659 P.2d 1, cert.
7 denied, ____ U.S.____, 103 S.Ct. 244, 77 L.Ed.2d 1327
8 (1983); Spaziano v. State, 443 So.2d 508 (Fla. 1983);³
9 Zant v. Redd, 249 Ga. 211, 290 S.E.2d 36 (1982), cert.
10 denied, ____ U.S.____, 103 S.Ct. 3552, 77 L.Ed.2d 1398
11 (1983). Thus, petitioner's "acquittal" of certain
12 aggravating circumstances did not preclude the trial court
13 from finding those circumstances at resentencing.

14 II
15 THE CONSTITUTION DOES NOT REQUIRE THAT
16 THIS CASE BE REMANDED FOR RESENTENCING.
17 Petitioner contends that due process requires that his
18 case be remanded for resentencing because the Arizona
19 Supreme Court struck down one of the aggravating factors
20 found by the trial court. See State v. Poland, supra, 698
21 P.2d at 199-200. Thus, petitioner concludes, there is
22 doubt whether the trial court would still have imposed the
23 death penalty in the absence of the one factor, and a
24 remand is therefore necessary.

25 Petitioner's position is meritless. As pointed out in
26 the preceding argument, in all death penalty cases the
27 Arizona Supreme Court independently reviews the record to
28 determine the pre e or absence of mitigating and
29 aggravating circumstances and the weight to be given each.

30 3. This Court affirmed Spaziano's conviction and
31 sentence in Spaziano v. Florida, ____ U.S.____, 104 S.Ct.
32 3154, 82 L.Ed.2d 340 (1984), although it did not consider
the "double jeopardy-aggravating circumstance" issue.

1 State v. Richmond, *supra*. See also State v. Nash, 143
2 Ariz. 392, 404, 694 P.2d 222, 234 (1985). The Arizona
3 court exercised that authority in this case and concluded
4 the death penalty was warranted even in the absence of the
5 "heinous, cruel or depraved" aggravating circumstance.
6 State v. Poland, *supra*, 698 P.2d at 202. The court was
7 well aware of the history of petitioner's case. It knew
8 the trial court had previously imposed the death penalty on
9 the basis of the "heinous, cruel or depraved" circumstance
10 alone. It also knew that at resentencing the trial court
11 had reimposed the death penalty on the basis of three
12 aggravating circumstances. The mitigating factors at both
13 sentencings differed little and were of minor importance.
14 Under these circumstances, to remand this matter for a
15 third sentencing would be a waste of judicial resources.
16 There is no doubt that the trial court would reimpose the
17 death penalty.

18 This Court's holdings do not mandate a different
19 result. In Zant v. Stephens, ____ U.S.____, 103 S.Ct. 2733,
20 77 L.Ed.2d 235 (1983), this Court upheld Georgia's decision
21 that a death sentence need not be set aside merely because
22 one of three aggravating factors had been set aside on
23 appeal. This Court did not set up guidelines in Zant
24 delineating when remands are and are not required. Indeed,
25 in Parclay v. Florida, ____ U.S.____, 103 S.Ct. 3418, 77
26 L.Ed.2d 1134 (1983), this Court noted that so long as the
27 capital sentencing discretion is guided in a
28 constitutionally adequate way and so long as the sentencing
29 decision is not so wholly arbitrary as to offend the
30 Constitution, the Eighth Amendment does not require more.
31 Arizona's decision not to remand petitioner's case for
32

1 resentencing was a sound exercise of discretion. The
2 Arizona Supreme Court stated its reasons for affirming the
3 death penalty despite the invalidation of one aggravating
4 circumstance. Its action was not arbitrary. The Arizona
5 Supreme Court's decision to remand an earlier case⁴ for
6 resentencing after it had struck down several aggravating
7 factors came before this Court's decisions in Zant and
8 Barclay established that such remands are not always
9 constitutionally required. Therefore, the fact that the
10 Arizona Supreme Court did not remand petitioner's case for
11 resentencing does not entitle him to relief from this Court.
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4. State v. Gillies, 135 Ariz. 500, 516, 662 P.2d 1007, 1023 (1983).

1

CONCLUSION

2 Because petitioner has failed to show a violation of
3 any constitutional right, this Court should deny the
4 petition for certiorari.

5 Respectfully submitted,

6 ROBERT K. CORBIN
7 Attorney General

8 WILLIAM J. SCHAFER III
9 Chief Counsel
Criminal Division

10 *Gerald R. Grant*

11 GERALD R. GRANT
12 Assistant Attorney General

13 Attorneys for RESPONDENT

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A F F I D A V I T

1
2 STATE OF ARIZONA)
3 COUNTY OF MARICOPA) ss.
4

5 GERALD R. GRANT, being first duly sworn upon oath,
6 deposes and says:

7 That he served the attorney for the petitioner in the
8 foregoing case by forwarding two (2) copies of RESPONSE TO
9 PETITION FOR WRIT OF CERTIORARI, in a sealed envelope,
10 first class postage prepaid, and deposited same in the
11 United States mail, addressed to:

12 MARC E. HAMMOND
13 PERRY, HAMMOND, DRUTZ & MUSGROVE
14 P.O. Box 2720
15 Prescott, Arizona 86302
16 Attorney for PETITIONER

17 this 30th day of July, 1985.

18 *Gerald R. Grant*
19 GERALD R. GRANT

20 SUBSCRIBED AND SWORN to before me this 30th day of
21 July, 1985.

22 *Chris L. Piske*
23 CHRIS L. PISKE
24 NOTARY PUBLIC

25 My Commission Expires:

26 October 28, 1985

27 CR42-009/
28 6909D clp